RECENT CASES

AGRICULTURE—SECTION 8c(5)(G) OF THE AGRICULTURAL MARKETING AGREEMENT ACT PROHIBITS FEDERAL MILK MARKETING ORDERS FROM REQUIRING COMPENSATORY PAYMENTS THAT CONSTITUTE TRADE BARRIERS

Petitioners, Pennsylvania dairies and milk handlers, sold fluid milk in the New York-New Jersey marketing area. The area marketing order—part of a federal regulatory scheme aimed at preventing ruinous competition in over-supplied markets—required milk handlers who sold fluid milk from outside the area to pay the difference between the area fluid and surplus milk prices [1] into a fund to compensate area milk producers whose milk was displaced from the profitable fluid milk market. Petitioners' challenge to this compensatory payment scheme was rejected by the Third Circuit which reversed the district court.[2] The Supreme Court, however, Mr. Justice Black dissenting, found that the compensatory payments constituted an economic trade barrier, inconsistent with section 8c(5)(G) of the Agricultural Marketing Agreement Act of 1937.[3] *Lehigh Valley Co-op. Farmers, Inc. v. United States*, 370 U.S. 76 (1962).

Section 8c(5)(G) provides:

> No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

The Eighth Circuit, in *Bailey Farm Dairy Co. v. Anderson*,[4] held that the word "limit" applied only to "the products of milk" so that orders of the Secretary of Agriculture could limit but not absolutely prohibit the mar-

---

[1] See 7 C.F.R. § 1002 (1962) for the entire marketing order for the New York-New Jersey milk marketing area. The amount of payment was computed as the difference between the fluid milk price and the surplus milk price—the amount of money that the outside handler would divert from the marketing area. The Secretary of Agriculture ruled that, since the outside handlers would not enter the marketing area unless they had surplus milk to sell, they should not receive more than the value of the milk as surplus milk.

[2] United States v. Lehigh Valley Co-op. Farmers, Inc., 287 F.2d 726 (3d Cir. 1961), *reversing* 183 F. Supp. 80 (E.D. Pa. 1960), but *affirming* Suncrest Farms, Inc., 18 Agri. Dec. 191 (1959), and Lehigh Valley Co-op. Farmers, 18 Agri. Dec. 75 (1959).

[3] 50 Stat. 246 (1937), as amended, 7 U.S.C. § 608c(5) (1958).

[4] 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946). Although the marketing order was very dissimilar to that in the instant case, the Eighth Circuit's interpretation of § 8c(5)(G) is irreconcilable with the present majority's construction.

keting of milk itself. In *H. P. Hood & Sons v. DuMond*,[5] a majority of the Supreme Court expressly left the question open,[6] while Justices Black and Murphy, dissenting, approved the *Bailey* interpretation.[7] The Department of Agriculture has consistently followed the *Bailey* interpretation and has repeatedly dismissed petitions in which producers and handlers have contended that marketing orders were inconsistent with section 8c(5)(G).[8]

The Court, not obliged to defer to the interpretation of section 8c(5)(G) adopted by the Department of Agriculture,[9] independently interpreted the statute, drawing heavily on legislative history. The majority found that Congress intended not only to prohibit all absolute physical restrictions on the marketing of milk but also to prohibit all economic barriers to trade except those specifically allowed by other clauses of section 8c.[10] The dissent, however, objecting that the majority's construction did violence to the deliberately chosen language of section 8c(5)(G), followed the *Bailey* interpretation and said that the word "prohibit" applied only to "blanket prohibitions," not to a trade barrier.[11]

The legislative history of 8c(5)(G) shows that Congress intended milk marketing to remain competitive. Originally, the proposed act contained no equivalent of the section, but four midwestern Congressmen[12] insisted on such a provision and pressed for a prohibition of any orders that would limit or even tend to limit the marketing of milk in any area of the country;[13] they agreed to the present provision only after repeated

---

[5] 336 U.S. 525 (1949).

[6] *Id.* at 543-44. Since this case involved state rather than federal regulation, the Court did not have to interpret the Agricultural Marketing Agreement Act. The Court's treatment of this point may have indicated a disapproval of *Bailey*, because the Court stated that the purpose of the act was to stimulate interstate commerce. See note 7 *infra*. *Id.* at 544-45.

[7] "Congress has even given him [the Secretary of Agriculture] power to limit milk shipments as between different federal marketing areas." H. P. Hood & Sons v. DuMond, 336 U.S. 525, 561 (1949) (dissenting opinion). The majority in dictum disagreed as to the powers of the Secretary under the Agricultural Marketing Agreement Act.

Section 8c(5)(G) was also mentioned by Judge Learned Hand, dissenting, in Kass v. Brannan, 196 F.2d 791 (2d Cir.), *cert. denied*, 344 U.S. 891 (1952), in which he agreed with the *Bailey* interpretation. However, the majority did not reach the limitation issue; it decided that a federal milk marketing order was invalid because it led to a discriminatory classification of milk, outlawed by § 8c(5)(A).

[8] *E.g.*, Grocer's Dairy Co., 18 Agri. Dec. 995 (1959); Chapman, 18 Agri. Dec. 323 (1959); Suncrest Farms, Inc., 18 Agri. Dec. 191 (1959); Lawson Milk Co., 17 Agri. Dec. 239 (1958). In Chapman, *supra* at 336, the judicial officer cited *Bailey* and held that § 8c(5)(G) "precludes only a *prohibition* in a marketing order against the entry of milk into a marketing area."

[9] *Cf.* Davies Warehouse Co. v. Bowles, 321 U.S. 144, 156 (1944); 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 30.09, at 242 (1958).

[10] Instant case at 97-99. See generally Hutt, *Restrictions on the Free Movement of Fluid Milk under Federal Milk Marketing Orders*, 37 U. DET. L.J. 525, 530-41 (1960).

[11] Instant case at 104-09.

[12] Representative Andresen of Minnesota and Representatives Sauthoff, Boileau, and Hull of Wisconsin. See 79 CONG. REC. 9462, 9572 (1935).

[13] *Id.* at 9572 (remarks of Representative Sauthoff).

assurances from the Chairman of the House Committee on Agriculture[14] that the Secretary could not limit importation except in the manner provided in the statute.[15] 8c(5)(G) was authored,[16] amended, argued for, and thoroughly approved by Congressmen whose interests, which were in accord with those of the Chairman of the House Committee on Agriculture, demanded free movement of milk in interstate commerce, unhampered by trade barriers; the purpose of the section was thus to effect a competitive rather than a protective marketing system.[17]

Contrary to the dissent's assertion, the Court's use of a specific section—8c(5)(G)—to inhibit a general grant of power[18] does not frustrate the congressional design to aid milk producers, for section 1 states that the act aims to avoid conditions, such as trade barriers, that burden or obstruct interstate commerce.[19] In *H. P. Hood & Sons v. DuMond*,[20] the Court said that the deliberate policy of Congress was to prevent federal officers from placing barriers in the way of the interstate flow of milk.[21] Milk exportation is important to the economies of several midwestern states, and allowance of trade barriers would protect local producers at the

---

[14] Representative Jones of Texas.

[15] Mr. ANDRESEN. Is there anything in the milk section of the bill which gives the Secretary authority to set up trade barriers and stop the free flow in commerce throughout the United States of dairy products?

Mr. JONES. No. There is nothing in the bill that would authorize that. . . . [Except for sanitary regulations], he cannot set up any trade barriers which would keep them out.

Id. at 9462.

Mr. BOILEAU. Mr. Chairman, I should like to ask the distinguished chairman of the committee if in his opinion there is anything in this bill that gives to the Secretary of Agriculture or to anyone else any power to restrict the free flow of milk or any other commodity between the various States?

Mr. JONES. No; there is nothing in it that will do that. The only tendency is to make all sections comply with the same rules.

Id. at 9572.

[16] The author of section 8c(5)(G) was Representative Andresen of Minnesota. See *Hearings Before the Subcommittee on Dairy Products of the House Committee on Agriculture*, 84th Cong., 1st Sess., ser. M, pt. 1, at 73 (1955), in which Representative Andresen stated that the congressional intent of 8c(5)(G) had been disregarded.

[17] According to a 1941 interpretation of the act, restrictions on the entry of new producers and handlers can be accomplished only through cooperatives or by refusal of the health authorities to qualify milk for sale. The Secretary's orders may not make restrictions that would obstruct the free movement of milk. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, ECONOMIC STANDARDS OF GOVERNMENT PRICE CONTROL 79 (TNEC Monograph No. 32, 1941).

[18] Section 8c(7)(D) of the act authorizes the Secretary to issue orders "incidental to, and not inconsistent with, the terms and conditions specified . . . and necessary to effectuate" the price-fixing and other powers specifically given to him.

[19] It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

50 Stat. 246 (1937), as amended, 7 U.S.C. § 601 (1958).

[20] 336 U.S. 525 (1949).

[21] *Id.* at 544-45.

expense of the exporting producers and handlers;[22] therefore, the Court's decision effectuated the congressional policy to stimulate interstate commerce in milk.

The Court did not define "trade barrier," but implied that the order was illegal because the measure of the "compensatory" payments—the difference between the fluid and surplus milk prices—was arbitrary and unrealistic. Petitioner in the instant case paid a higher price for his milk than local handlers, yet he had to pay an additional $2.78 per hundredweight as a compensatory payment upon importation of the milk. His total cost, exclusive of transportation, was 47 percent higher than that of local handlers. The Court held that this disparity indicated that the measure does not further the legitimate end of competitive parity among producers and handlers, but forces imported milk to subsidize area milk, making the cost of importation prohibitive. The Court did state, however, that compensatory payment provisions per se are not necessarily trade barriers. An order may legitimately require the importing handler to pay an amount equal to the difference between his total cost exclusive of transportation expenses and the total cost to the local handler, thus requiring an outside handler to forfeit any cost advantage he may have. Although such a provision may still discourage the free flow of milk in commerce, especially if transportation costs are high,[23] it would not establish an unreasonable differential to bar importation. Thus, "trade barrier" is best defined as a charge that arbitrarily places an "undue hardship" on the importing handler and does not assure competitive parity among producers and handlers of different marketing areas.

The Court did not consider the possible effects of its holding on the government's agricultural programs, but its decision probably foreshadows

---

[22] Barriers to market entry prevent exporting producers from receiving prices comparable to those received by local producers because the compensatory payments force the imported milk into the lower priced classifications. See 7 C.F.R. § 1002.83(b) (1962).

In Minnesota, for example, 75% of the total dairy production must be exported, and the 1960 average price for Minnesota milk marketed in all forms was $3.07 per cwt. against the national average of $4.17. Brief for State of Minnesota as Amicus Curiae, p. 3. This disparity indicates that the milk marketing orders as promulgated under the act discriminate against exporting states and force their milk to be sold for use as surplus rather than as fluid milk.

[23] The Court said that competitive parity among handlers could be attained without imposing trade barriers. It specified two types of compensatory payment plans that might not violate 8c(5)(G) by imposing "trade barriers": first, payments equalling the difference between the fluid milk price in the marketing area and the actual cost of the outside milk; and second, payments to equal the difference between the area's fluid milk and producer prices. See instant case at 86-87. Such orders, however, could restrict the free flow of milk, as in the following example: A Wisconsin handler pays $5.00 per cwt. for his milk and brings it into New York, where the fluid milk price is $6.00; under the first plan he would be required to pay a compensatory payment of $1.00 per cwt., which would make his cost $6.00 per cwt. But his transportation expense of $1.00 per cwt. raises his total cost to $7.00 per cwt., and the compensatory payment of $1.00 per cwt. has made it economically unfeasible for him to ship milk into the New York area. Because it ignores transportation costs, the proposed plan imposes what could be described as a trade barrier, but such a payment scheme probably would not be prohibited by the holding in the instant case.

the invalidation of many federal milk marketing orders.[24] Since the Secretary had indicated that the compensatory payments in the present case were the only ones practicable for the New York area[25] and perhaps for other areas as well, he will now have to abandon his present policies, especially if the Court's holding is interpreted to forbid the formulation of area marketing orders designed to prevent the underselling of local by outside milk.[26] The regulation of milk marketing is extremely complex; since the Secretary rather than the Court is competent to establish marketing regulations, the Court did not suggest guidelines for future orders.[27] However, the Secretary will be cognizant of his lack of authority to issue milk marketing orders that unduly burden interstate shipments of fluid milk.

CONSTITUTIONAL LAW—SECOND CIRCUIT REFUSES TO LIMIT POLICE INVESTIGATIONS OF PERSONS ACCUSED OF CRIME

While defendant was free on bail after indictment for violation of the federal narcotics law, a confederate allowed a federal officer to place a listening device in his car and there engaged defendant in a discussion of the crime. The officer monitored the unguarded admissions made during the conversation, and testified at the later trial. Defendant claimed that since he was already under indictment at the time and was represented by counsel, it was a denial of his rights for a federal officer to procure his statements in the absence of counsel. The Court of Appeals for the Second Circuit, one judge dissenting,[1] concluded that since there was no element of coercion the overheard conversation was admissible in evidence. *United States v. Massiah*, 307 F.2d 62 (2d Cir. 1962).

[24] The Secretary has promulgated twenty-two orders substantially identical to the one involved here. Instant case at 83. As of April 1, 1955, 87% of producer deliveries in the United States went into marketwide pools or pools generally similar to that in the instant case. HARRIS, CLASSIFIED PRICING OF MILK 25 (U.S. Dep't of Agriculture Tech. Bull. No. 1184, April 1958).

[25] 18 Fed. Reg. 8446-51 (1953).

[26] See HARRIS, *op. cit. supra* note 24, at 33.

[27] The Court left the question of retrospective application of future orders undecided, to be determined by the district court. On remand, since the government failed to show that the district court had authority to withhold the amount of the payments and await the formulation of future provisions by the Secretary, the District Court for the Eastern District of Pennsylvania, Clary, J., dismissed the action and awarded the petitioners the full amount paid into the fund. Civil Nos. 23268, 26048, 26109, E.D. Pa., Aug. 29, 1962. *But see* United States v. Morgan, 307 U.S. 183, 196-98 (1939).

[1] The dissenting judge was influenced by the liberal rule adopted by the Court of Appeals of New York, in construing the right to counsel provision of the New York Constitution, that no statement made by an accused to a police officer after indictment in the absence of counsel can be used as evidence. People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961). Recently the New York court went further and held that a voluntary, unsolicited statement made by a defendant to a police officer after preliminary hearing and before indictment is not admissible in evidence against him. People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962).

The Supreme Court does not regard police questioning as inherently coercive, and recognizes its social utility in effective law enforcement.[2] The Court has adhered to the principle that in considering the validity of a confession or admission[3] resulting from an interrogation it will attempt to ascertain whether the statement was made voluntarily.[4] A statement is not inadmissible simply because it was not volunteered without questioning,[5] or because its maker was in custody,[6] or under indictment,[7] or without counsel[8] at the time.

Recently several Supreme Court Justices have spoken of a possible right to counsel at secret police interrogations[9] because the atmosphere created by interrogation in a room under police control readily lends itself

---

[2] See Stein v. New York, 346 U.S. 156, 184-85 (1953).

[3] Admissions and confessions are generally treated similarly. See Opper v. United States, 348 U.S. 84, 91 (1954). Nevertheless, on a practical level, courts may be less willing to find coercion when admissions are made than when confessions are obtained.

[4] See, *e.g.*, Reck v. Pate, 367 U.S. 433, 442 (1961); Blackburn v. Alabama, 361 U.S. 199, 211 (1960); Lyons v. Oklahoma, 322 U.S. 596, 602 (1944). Coercive methods include physical abuse, see Brown v. Mississippi, 297 U.S. 278 (1936), intensive and prolonged interrogation, see Chambers v. Florida, 309 U.S. 227 (1940), generally oppressive situations indicating strong likelihood the admission was not freely made, see Watts v. Indiana, 338 U.S. 49 (1949) (opinion of Frankfurter, J.), methods designed to overbear the defendant, see Spano v. New York, 360 U.S. 315 (1959).

The traditional explanation for excluding involuntary confessions is that statements made under these conditions are untrustworthy as evidence, see Lisenba v. California, 314 U.S. 219, 236 (1941); 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940). This is no longer the sole test, however, since coerced confessions are also said to undermine the tenets of an accusatorial system. See Rogers v. Richmond, 365 U.S. 534 (1961); Lisenba v. California, *supra* at 236; Spano v. New York, 360 U.S. 315, 325-26 (1959) (Douglas, J., concurring); Watts v. Indiana, *supra* at 55 (opinion of Frankfurter, J.). The reasons for excluding involuntary confessions and for the privilege from self-incrimination shade into one another, see Culombe v. Connecticut, 367 U.S. 568, 583 n.25 (1961) (opinion of Frankfurter, J.); 8 WIGMORE, *op. cit. supra* § 2286, but, having separate historical developments, are not coterminous. Thus, whereas a person cannot be questioned at his own trial without his consent, see Wood v. United States, 128 F.2d 265, 268-69 (D.C. Cir. 1942); United States *ex rel.* Reck v. Ragen, 172 F. Supp. 734, 739-40 (N.D. Ill. 1959), *aff'd*, 274 F.2d 250 (7th Cir. 1960), *rev'd on other grounds sub nom.*, Reck v. Pate, 367 U.S. 433 (1961), the Court has not extended the same protection to investigative hearings wherein legal process can be served, see *In re* Groban, 352 U.S. 330 (1957), much less to police investigations. Rather, the Court decides if the method of interrogation is consistent with due process and the accusatorial system. See Lisenba v. California, *supra* at 236; Watts v. Indiana, *supra* at 54 (opinion of Frankfurter, J.).

Even if a statement is voluntary, the Court will exclude, at least in federal trials, confessions that were gained through violation by investigative officers of other protected rights. See, *e.g.*, Silverman v. United States, 365 U.S. 505 (1961) (use of spike-mike an unlawful search and seizure); McNabb v. United States, 318 U.S. 332 (1943) (violation of a congressional statute). See generally *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 158-60 (1961).

[5] See Lisenba v. California, *supra* note 4, at 239; Watts v. Indiana, *supra* note 4, at 53 (opinion of Frankfurter, J.).

[6] See, *e.g.*, United States v. Carignan, 342 U.S. 36, 39 (1951); United States v. Mitchell, 322 U.S. 65, 69 (1944).

[7] See Spano v. New York, 360 U.S. 315, 320 (1959) (dictum).

[8] See Cicenia v. Lagay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958).

[9] See, *e.g.*, Cicenia v. Lagay, *supra* note 8, at 508-09; Crooker v. California, *supra* note 8, at 439 n.4.

to coercion.[10] Emphasizing the directness of his contact with the investigating officer, through the agency of the confederate, defendant in the instant case attempted to place himself within the scope of these remarks and to categorize the occurrence as an "interrogation."[11] Significantly, however, the Justices who have most strongly criticized secret questioning have stressed that the presence of counsel is desirable to prevent coercive third degree methods,[12] rather than to guard against voluntary admissions. Since the fact of indictment can in no way change the voluntariness of admissions, the "interrogation" in the present case did not present the dangers that would require the presence of counsel to protect the rights of the accused.[13] Thus, the extension of the right to counsel to situations in which the atmosphere surrounding the questioning is not likely to foster coercion and in which the defendant is neither overborne nor forced to make admissions would needlessly handicap police investigation without compensating gain.

If the activity of the officers violated any right in the instant case it was not specifically the right to presence of counsel, but a broader right to prepare for trial without hindrance. The courts have traditionally valued defendants' right to prepare for trial as a necessary part of the adversary system, and have imposed safeguards to insure that one method of preparation, the assistance of counsel, remains more than a formality. Counsel must have sufficient time to prepare the defense[14] unhampered by other judicially imposed duties.[15] The accused has a right to private

---

[10] A leading text on police investigations describes an atmosphere that understandably concerns the Court:

> The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights. . . . In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of law.

O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1961). See also Crooker v. California, 357 U.S. 433, 443 (1958) (Douglas, J., dissenting); *In re* Groban, 352 U.S. 330, 353 (1957) (Black, J., dissenting).

[11] The definition proposed was similar to that recently offered in another federal case—an interrogation is any prodding or triggering statement by one who is an agent of the prosecuting authorities. United States v. Killough, 193 F. Supp. 905, 917 (D.D.C. 1961), *rev'd*, No. 16398, D.C. Cir., Oct. 4, 1962. The ordinary concept of interrogation is the questioning of a person reluctant to make full disclosure. See O'HARA, *op. cit. supra* note 10, at 95.

[12] See, *e.g.*, Culombe v. Connecticut, 367 U.S. 568, 640 (1961) (Douglas, J., concurring); Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring); *In re* Groban, 352 U.S. 330, 340-43 (1957) (Black, J., dissenting).

[13] The Supreme Court has shown no inclination to adopt a rule as strict as that of India which excludes all confessions made to a police officer, see Culombe v. Connecticut, 367 U.S. 568, 588 (1961) (opinion of Frankfurter, J.); nor as that of Scotland which prohibits all interrogations of arrested persons, see United States v. Killough, 193 F. Supp. 905, 915 (D.D.C. 1961), *rev'd*, No. 16398, D.C. Cir., Oct. 4, 1962; nor even necessarily as that of England which requires that a person before speaking with police be advised of his right not to speak until he has secured counsel, see Slovenko, *Representation for Indigent Defendants*, 33 TUL. L. REV. 363, 371 (1959).

[14] See Tinkle v. United States, 254 F.2d 23, 29 (8th Cir. 1958); Avery v. Alabama, 308 U.S. 444, 446 (1940) (dictum).

[15] See Glasser v. United States, 315 U.S. 60, 76 (1942).

consultation with counsel,[16] and police may not use mechanical devices or agents to overhear these conferences.[17] In addition, police cannot spy on counsel's conversations with prospective witnesses concerning their testimony at trial,[18] nor can federal officers place a spy in the office of a defendant's lawyer to pose as an ally and gain information about the conduct of the defense.[19]

These protections surrounding the right to counsel cannot be divorced from the reasons for their existence. Normally courts explain the right to counsel on the ground that the layman is unfamiliar with legal procedures and needs professional assistance to present his defense adequately.[20] The right to counsel, therefore, is part of a larger right of an accused to present *his* defense. Since preparation for trial requires examination of facts as well as law,[21] a defendant can aid his own cause by investigating the facts concerning his alleged crime. A strong argument can be made that some limitation should be placed on police methods, such as spying and use of mechanical devices, when they may interfere with a defendant's ability to prepare effectively for trial, even though they do not constitute an illegal search and seizure.[22] If the state cannot eavesdrop on a lawyer's inquiries of witnesses concerning their testimony at trial, nor send out spies to extract information from him,[23] similar protection should extend to the accused himself for whose interest the lawyer is safeguarded. Uncontrolled police spying on conversations of an accused with witnesses or alleged accomplices can eliminate one avenue of trial preparation, since an accused can do little to protect himself against spying except to leave his defense entirely in the hands of his attorney.[24]

One way to protect the right of a defendant to prepare his own defense is to establish a broad rule that evidence gained through the use of mechanical devices or spies after either preliminary hearing or indictment will be excluded at trial. Such a rule would be relatively easy to enforce,

---

[16] See Coplon v. United States, 191 F.2d 749, 757 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952); United States v. Venuto, 182 F.2d 519, 522 (3d Cir. 1950).

[17] See Caldwell v. United States, 205 F.2d 879, 881 n.10 (D.C. Cir. 1953); Coplon v. United States, *supra* note 16, at 759-60.

[18] See United States v. Lebron, 222 F.2d 531, 534 (2d Cir.) (dictum), *cert. denied*, 350 U.S. 876 (1955).

[19] See Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953).

[20] See Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

[21] *Cf.* House v. Mayo, 324 U.S. 42, 46 (1945); Tinkle v. United States, 254 F.2d 23, 29 (8th Cir. 1958); Krull v. United States, 240 F.2d 122, 126 (5th Cir.), *cert. denied*, 353 U.S. 915 (1957).

[22] Use of mechanical devices and spies does not constitute an illegal search and seizure, see On Lee v. United States, 343 U.S. 747 (1952); United States v. Kabot, 295 F.2d 848, 853-54 (2d Cir. 1961), *cert. denied*, 369 U.S. 803 (1962), unless a trespass occurs, see Silverman v. United States, 365 U.S. 505 (1961).

[23] See text accompanying notes 18-19 *supra*.

[24] Usually his lawyer will be handling more than one case at the same time, and thus may not be able to devote full time to an investigation of the facts of the case. *Cf.* United States v. Kelley, 186 F.2d 598, 600 (7th Cir.), *cert. denied*, 341 U.S. 954 (1951).

would reduce the risk of police overhearing the accused's discussion of the alleged crime with those who might help him, and thus would enable him to be open in his discussions in order to gain the confidence of those to whom he speaks. But, since curtailment of police investigation during the entire pretrial period may disserve the public interest in effective enforcement of the criminal law, perhaps the limited period between indictment and trial could be singled out as a more appropriate period for the protection of all of the accused's conversations.[25] After indictment a defendant has notice of the precise charge against him, and has the right to determine his plea at arraignment.[26] At this point the process of the state has progressed far enough so that added protection of the accused as a defendant is justified.[27] Such a broad rule, however, would have several disadvantages. Police might desire to use mechanical devices to gain information about other crimes in which the accused is implicated. This is especially true in a case like the present in which the accused may be part of an organized conspiracy that the police are continuing to investigate.[28] To exclude evidence gained through any spying on the accused during part or all of the pretrial period might unduly shelter his other illegal activities. A balance might be achieved by protecting only conversations with known witnesses or alleged accomplices.

Although not fully protecting the accused, a more narrow rule might more evenly balance the conflicting interests of the defendant and the state. Officers could continue to use mechanical devices throughout the pretrial period, but no information gained thereby would be admissible if the defendant was *in fact* attempting to prepare his defense. This rule could take effect immediately after preliminary hearing, and would permit the defendant to commence his own preparation while the memories of witnesses are fresh. Police would not be hampered in efforts to discover information about additional crimes and accomplices, since only those conversations in which the defendant was seeking information for his defense

[25] Although the ease of application is a strong factor in favor of such a rule, there are several difficulties with it. Police activity might be unduly hampered during a long period, since there is no set time between indictment and arraignment and trial. See Von Moltke v. Gillies, 332 U.S. 708, 712 (1948) (opinion of Black, J.) (indictment Sept. 18, arraignment Sept. 21); Picciurro v. United States, 250 F.2d 585, 591 (8th Cir. 1958) (indictment Feb. 14, arraignment March 18, trial March 20); United States v. Kelley, 186 F.2d 598, 600 (7th Cir.), *cert. denied*, 341 U.S. 954 (1951) (indictment March 20, arraignment March 24, trial June 20). See also United States v. Koplin, 227 F.2d 80, 81-82 (7th Cir. 1955) (three years between indictment and trial). In addition, there is no direct correlation between the time between indictment and arraignment and trial, and the time necessary to prepare a defense. No inflexible rule can determine how much time is sufficient for any particular investigation, see United States v. Richmond, 295 F.2d 83, 88 (2d Cir.), *cert. denied*, 368 U.S. 948 (1961); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); United States *ex rel.* Thompson v. Nierstheimer, 166 F.2d 87, 88 (7th Cir.), *cert. denied*, 334 U.S. 850 (1948). Moreover, police might be tempted to postpone arrests of suspected individuals for fear that their investigation of connected crimes would be halted.

[26] *Cf.* Hamilton v. Alabama, 368 U.S. 52, 55 (1961); House v. Mayo, 324 U.S. 42, 45-46 (1945).

[27] *Cf.* Spano v. New York, 360 U.S. 315, 327 (1959) (Stewart, J., concurring).

[28] See instant case at 67.

would be excluded. However, the mere possibility that police might be able to use as evidence conversations overheard though mechanical devices would tend to discourage and restrict the defendant's preparation. In addition, he may have to frame every statement so that if overheard it will appear to have been made in preparation of his defense. Moreover, a judge might be reluctant to find a conversation preparatory when it contained damaging admissions, or might draw distinctions within the same conversation between remarks that sought information and those that did not. Thus, even in this area of self-help, the defendant might require the aid of counsel to determine the type of questions that could be asked. Perhaps, then, there is need of a more pervasive limitation on police investigations that substantially interfere with the right to prepare for trial.

CRIMINAL LAW—MISTAKE OF FACT HELD NO DEFENSE TO THIRD DEGREE ASSAULT

A passerby observed two men struggling with a boy on the street and intervened, injuring one of the men. The men were plainclothes policemen making a lawful arrest. The intervener was arrested and convicted of third degree assault.[1] The New York Appellate Division reversed the conviction but was itself reversed by the Court of Appeals, which held, two judges dissenting, that mistake of fact is not a defense to a charge of third degree assault. *People v. Young*, 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962) (per curiam).

Although "it is universally agreed that reasonable mistake exculpates in self-defense," [2] in most jurisdictions an intervener may use only such force in aid of one apparently assaulted as the person aided could legally use in his own behalf.[3] Consequently, a mistake of fact as to the lawfulness

---

[1] N.Y. PEN. LAW § 244: "A person who: 1. Commits an assault, or an assault and battery, not such as is specified in sections . . . [240 and 242], or . . . [2. drives in a culpably negligent manner and injures someone, or 3. strikes a press photographer]. . . . Is guilty of assault in the third degree." Section 240 defines assault in the first degree: "A person who, with an intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another: 1. Assaults another with a . . . [deadly weapon] . . . Is guilty of assault in the first degree." Section 242 defines assault in the second degree:

> A person who, under circumstances not amounting to the crime specified in . . . [§ 240],
>
> . . . .
>
> 3. Wilfully and wrongfully wounds . . . another, either with or without a weapon; or
>
> 4. Wilfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm; or,
>
> 5. Assaults another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person,
>
> Is guilty of assault in the second degree.

[2] MODEL PENAL CODE § 3.05, comment (Tent. Draft No. 8, 1958).

[3] *E.g.*, Robinson v. City of Decatur, 32 Ala. App. 654, 29 So. 2d 429 (1947); Guerriero v. State, 213 Md. 545, 132 A.2d 466 (1957); McBroom v. State, 26 Okla. Crim. 352, 224 Pac. 210 (1924).

of an apparent attack is no defense if the person defended knew that the attack was a legal arrest. There is, however, some authority to the contrary.[4] Prior to the instant case, the New York courts had never faced this issue, but statutes in that state make mistake of fact a defense if an intervener kills in the reasonable belief that it is necessary to protect a third party from serious injury,[5] and also authorize the use of force to protect a third party from an assault which is in fact unlawful.[6]

The Court of Appeals in the present case summarily adopted the majority rule as being more "conducive to an orderly society." [7] Presumably, this court, like the dissenters in the Appellate Division,[8] accepted the state's argument[9] that the protection of plainclothes policemen is more important than encouraging well-intentioned interventions on behalf of unlawfully assaulted persons. The court therefore constructed a rule designed to deter most, if not all, interventions,[10] holding, in effect, that a wrongful intent is not necessary for a conviction of third degree assault.

The court distinguished the New York rule exculpating interveners who kill in the reasonable belief of necessity on the ground that a murder charge requires proof of specific intent. This distinction merely emphasizes the fact that one must intend to act unlawfully in order to be guilty of murder,[11] but there is indeed more motivation to accept mistake of fact in homicide cases since the consequences of conviction are so drastic.

---

[4] See State v. Chiarello, 69 N.J. Super. 479, 174 A.2d 506 (App. Div. 1961), *petition for certification denied*, 36 N.J. 301, 177 A.2d 343 (1962); MODEL PENAL CODE §§ 3.05, 3.09 (Tent. Draft No. 8, 1958) and comments appended thereto. See generally 2 BURDICK, CRIME § 437, at 136-37 (1946) (mistake a defense in homicide cases); CLARK & MARSHALL, CRIMES §§ 56, 211, 290 (5th ed. 1952); Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 7 (1957) (mistake should not have to be reasonable); Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 54-58 (1939); Woodruff, *Mistake of Fact as a Defense*, 63 DICK. L. REV. 319 (1958).

[5] N.Y. PEN. LAW § 1055:

> Homicide is also justifiable when committed: 1. In the lawful defense of the slayer . . . or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury . . . to any such person, and there is imminent danger of such design being accomplished . . . .

[6] N.Y. PEN. LAW § 246(3): Use of force is lawful "When committed either by the party about to be injured or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person . . . ."

[7] Instant case at 275, 183 N.E.2d at 319, 229 N.Y.S.2d at 2.

[8] People v. Young, 12 App. Div. 2d 262, 271, 210 N.Y.S.2d 358, 367 (1961).

[9] Brief for Appellant, pp. 10-11.

[10] An exception would be the situation in which the intervener was certain that the attack was illegal.

[11] The ultimate question in any prosecution is whether or not all of the essential elements of guilt are established. If any such element is found to be wanting, guilt has not been substantiated; and hence if proof of a mistake of fact . . . negatives the existence of such an element, it also disproves the charge itself.

Perkins, *supra* note 4, at 56.

Nor is the present decision inconsistent with the well-settled rule[12] that a reasonable mistake of fact is a defense when the actor was defending himself from an apparent attack. It is difficult not to act on appearances in cases of self-defense; a person's interest in protecting someone else is much less compelling. In addition, a self-defender is less likely to be mistaken than a "Good Samaritan," who is probably less able to ascertain when a party to an affray is justified in his actions. Consequently, it might be said that interveners are entitled to less protection from the law than persons acting in self-defense and may justifiably be required to act at their peril.[13]

Nevertheless, the sanctions of the criminal law traditionally have been directed toward persons who either knowingly commit unlawful acts or act with reckless disregard of the rights of others.[14] This policy accords with the commonly accepted ends of the criminal law: the punishment, incapacitation, and reformation of actual offenders, and the deterrence of potential offenders.[15] One who has acted reasonably and with good intentions need not and ought not to be punished, incapacitated, or reformed. He is no more dangerous than any other reasonable man and in this respect is unlike an actor who is so dull-witted that what appears proper to him is actually reckless or unlawful.[16] His punishment can only be justified on the ground of deterrence. Even though the defendant in the present case is not deserving of criminal punishment, his conviction theoretically discourages other potential Good Samaritans, who unrealistically are presumed to know the law, from committing reasonable but socially dangerous acts. The drafters of the Model Penal Code have rightly condemned this position as "indefensible," declaring that liability without culpability "has no place in penal law." "The law is made to govern men in their conduct and they must act on their appraisal of a situation, if they are to act at all."[17] Conviction for assault and battery, absent culpability, cannot be

---

[12] See MODEL PENAL CODE § 3.05, comment (Tent. Draft No. 8, 1958).

[13] *Ibid.*

[14] "[H]e who injured another . . . through unavoidable mistake might be liable for the damages which he caused, but since he lacked a blameworthy mind he was not punishable for a crime. Blameworthiness thus came to be and still remains the foundation of the conception of criminality." Sayre, *The Present Significance of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 401-02 (1934). When the framers of the Model Penal Code adopted the rule that all mistakes of fact are defenses if the defendant was not reckless, they based their decision on the lack of culpability. MODEL PENAL CODE § 3.05, comment (Tent. Draft No. 8, 1958). At common law, public nuisances seem to be the only exception to the rule that criminal guilt requires *mens rea*. Perkins, *supra* note 4, at 58-59. These offenses were included in the "crime" category for convenience, in order that they might be handled procedurally by the machinery used for criminal cases. *Ibid.*

[15] See MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 6-11 (1940); 1 WHARTON, CRIMINAL LAW & PROCEDURE, §§ 1-9 (Anderson ed. 1957).

[16] Mental or emotional deficiencies short of insanity, a finding of which permits confinement in a mental hospital, are not a defense in a criminal prosecution. *E.g.*, Fisher v. United States, 328 U.S. 463 (1946); People v. Moran, 249 N.Y. 179, 163 N.E. 553 (1928).

[17] MODEL PENAL CODE § 3.04, comment (Tent. Draft No. 8, 1958).

justified by reference to the common practice of convicting persons of the minor statutory offenses known as "public welfare offenses" without a showing of wrongful intent or recklessness.[18] In the public welfare offense cases the penalty is usually slight, the stigma resulting from conviction small, and the need for large scale enforcement great;[19] moreover, it is likely that in many instances the defendant knew or should have known that he was acting unlawfully. To require a showing of wrongful intent or recklessness probably would not result in many acquittals but might well erect an administrative impediment to the enforcement of necessary regulations.

To some extent the court in the present case could have achieved its goal of deterrence by reversing the conviction and granting the injured party relief in a civil assault action in which mistake of fact would not be a defense.[20] It is likely, however, that some interveners will be judgment-proof. In addition, exclusive reliance on a civil remedy will result in a lesser degree of deterrence. Nevertheless, it is doubtful that these factors justify the imposition of criminal liability without fault.

DISCOVERY—Opinion of Adverse Party's Prospective Appraiser-Witness Discoverable as of Right

Pursuant to Rule 33 of the Arizona Rules of Civil Procedure, the state served interrogatories on the landowner-defendants in a condemnation case. The interrogatories requested the opinion of the defendants' appraiser who was to testify at trial. The trial court sustained the defendants' objection that the interrogatories sought the work product of their attorney. On appeal, the Arizona Supreme Court held that the information requested

---

[18] In general, offenses not requiring *mens rea* are the minor violations of laws regulating the sale of intoxicating liquor, impure or adulterated food, milk, drugs or narcotics, criminal nuisances, violations of traffic or motor-vehicle regulations, or of general police regulations passed for the safety, health, or well-being of the community and not in general involving moral delinquency.

Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 83 (1933).

[19] There are, however, some relatively serious offenses which are sometimes included in this category. For example, in New York a defendant can be sentenced to a maximum of one year in jail for the sale or possession of obscene material without a showing of criminal intent. N.Y. Pen. Law § 1141, People v. Shapiro, 6 App. Div. 2d 271, 177 N.Y.S.2d 670 (1958). One can also be found guilty of narcotic crimes, bigamy, or statutory rape without any proof of wrongful intent. It is difficult to justify the omission of wrongful intent as an element of such serious crimes.

[20] *Cf.* State v. McDonald, 7 Mo. App. 510 (1879). New York has not yet decided whether mistake of fact is a defense in a civil action for assault. The law in other jurisdictions is somewhat confused. See Prosser, Torts § 17 (2d ed. 1955); Restatement, Torts § 76 (1934). *Compare* Roberson v. Stokes, 181 N.C. 59, 106 S.E. 151 (1921), *with* Smith v. Delery, 238 La. 180, 114 So. 2d 857 (1959), *and* Patterson v. Kuntz, 28 So. 2d 278 (La. App. 1946).

was not work product and was discoverable as of right.[1] However, it found that the error below was not prejudicial and affirmed the verdict. *State ex rel. Willey v. Whitman*, 91 Ariz. 120, 370 P.2d 273 (1962).

Under the Arizona Rules of Civil Procedure, which are substantially the same as the Federal Rules,[2] the contents of a document, if not privileged, can generally be elicited as of right by means of depositions under Rule 26 or interrogatories under Rule 33.[3] It is generally accepted that experts' opinions are not privileged;[4] nevertheless, absent a showing of good cause, courts often deny discovery of expert opinions and have never permitted discovery of opinions contained in appraisers' reports.[5] No court has articulated a sound policy basis for so holding; most of the condemnation cases simply have relied on precedents which in turn rely on cases dealing with experts in non-condemnation proceedings.[6]

Some courts have attempted to justify nondisclosure of expert opinion on the basis of the work-product doctrine[7] originated in *Hickman v. Taylor*,[8] in which the Supreme Court held that statements obtained by a

---

[1] The court did, however, sustain the trial court's refusal to allow discovery of the names and addresses of all appraisers employed by the defendants. Instant case at 125-26, 370 P.2d at 277. This safeguarded the adversary nature of condemnation cases by insuring that a party may procure a number of appraisals while only submitting the most favorable at trial without fear that the others would be disclosed and used against him.

[2] The particular Arizona Rules referred to in this comment are identical in number and substance to the Federal Rules of Civil Procedure.

[3] Rule 34 permits a party to obtain the document itself, but only upon a showing of good cause.

[4] See, *e.g.*, Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948) (per curiam); Maginnis v. Westinghouse Elec. Corp., 207 F. Supp. 739, 742-43 (E.D. La. 1962); United States v. Certain Parcels of Land, 15 F.R.D. 224, 229 (S.D. Cal. 1953); 4 MOORE, FEDERAL PRACTICE ¶ 26.24, at 1152-56 (2d ed. 1950). Hickman v. Taylor, 329 U.S. 495, 508 (1947), which refused to characterize statements obtained by an attorney from prospective witnesses as within the attorney-client privilege, renders it difficult to sustain the argument that expert opinion falls within that privilege. 4 MOORE, *op. cit. supra* ¶ 26.24, at 1155.

[5] *E.g.*, United States v. Certain Acres of Land, 18 F.R.D. 98 (M.D. Ga. 1955), United States v. 7534.04 Acres of Land, 18 F.R.D. 146 (N.D. Ga. 1954). Courts have sometimes allowed discovery of the opinions of experts other than appraisers. *E.g.*, Bergstrom Paper Co. v. Continental Ins. Co., 7 F.R.D. 548 (E.D. Wis. 1947). However, this difference apparently does not result from any distinction made between appraisers and other experts. Facts gathered by an appraiser, as distinguished from his opinion, can often be discovered as of right under Rules 26 or 33. *E.g.*, United States v. 284392 Sq. Ft. of Floor Space, 203 F. Supp. 75 (E.D.N.Y. 1962); United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D. Cal. 1953). This is also true of facts gathered by non-appraiser experts. *E.g.*, Maginnis v. Westinghouse Elec. Corp., *supra* note 4; Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954).

[6] See, *e.g.*, United States v. 284392 Sq. Ft. of Floor Space, *supra* note 5; United States v. Certain Acres of Land, *supra* note 5; United States v. 7534.04 Acres of Land, *supra* note 5. The authority for many condemnation cases denying discovery of appraisers' opinions is a dictum in Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21, 23 (W.D. Pa. 1940). Instant case at 122-23, 370 P.2d at 275. *Lewis* was decided before condemnation proceedings were made subject to the Federal Rules of Civil Procedure. Rule 71A was not promulgated until 1951.

[7] See, *e.g.*, Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257 (D. Neb. 1959); Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684 (D. Mass. 1947).

[8] 329 U.S. 495 (1947).

lawyer from a prospective witness were discoverable only upon a "showing of necessity." [9] In extending this doctrine, at least one court has fictionalized the expert into an "assistant counsel," [10] but a recent district court decision placed work product in its proper perspective, defining it as the product of "a lawyer, doing a lawyer's work in preparing a case for trial." [11] If expert opinion is to be protected from discovery as of right, such protection should not be justified by the obvious fiction that an expert is a lawyer.[12] A more substantial rationale has been advanced—that unlimited discovery would give one party a "free ride," allowing him to use, without expense, the work of the other party.[13] This argument is not applicable to the instant case, for the state offered to pay for the information requested,[14] and, in any case a "free ride" can be avoided by conditioning discovery on the partial payment of expenses.[15] A more refined argument is that if expert opinion were discoverable as of right, an attorney might wait until his opponent had conducted an extensive investigation, discover what fruits of that investigation would be used against him at trial, and then employ an expert to refute only those points. If the area of expert inquiry were large, this might result in a considerable financial saving for the client, even if discovery were contingent on sharing costs. Should both attorneys be encouraged by discovery rules to play the waiting game, last minute and perhaps inadequate preparation might become the practice, resulting in a reduced standard of litigation.

However valid in other contexts, this argument is not persuasive when applied to condemnation cases. Since a party has little hope of convincing a jury that his opponent's expert valuation is wrong without introducing his own affirmative testimony concerning true value, both parties will invariably

[9] The "showing of necessity" required to justify discovery of work product is stronger than the good cause normally required under Rule 34. See 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 652.4 (Wright ed. 1961); 4 MOORE, FEDERAL PRACTICE ¶ 34.08, at 2454 (2d ed. 1950).

[10] See Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684, 687 (D. Mass. 1947).

[11] E. I. DuPont De Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416, 419 (D. Del. 1959).

[12] The Supreme Court justified the work-product doctrine on the ground that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). This rationale is obviously not applicable to the discovery of the substance of a completed report by an expert who is to testify at trial. One of the few courts of appeals cases in this area recognized that a metallographer "is not an attorney but is an expert" and refused to apply the work-product doctrine to his opinion. Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948) (per curiam).

[13] See, *e.g.*, Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940); 4 MOORE, FEDERAL PRACTICE ¶ 26.24, at 1157-59 (2d ed. 1950).

[14] Brief for Appellant, p. 6, instant case.

[15] See United States v. 50.34 Acres of Land, 13 F.R.D. 19, 21 (E.D.N.Y. 1952). See also Leding v. U.S. Rubber Co., 23 F.R.D. 220 (D. Mont. 1959); 4 MOORE, *op. cit. supra* note 13 ¶ 26.24, at 1157-58.

make their own complete appraisals. Moreover, unlike other controversies requiring expert testimony, the area of expert inquiry in condemnation cases is confined to the value of the land; appraisers will differ only as to the factors considered relevant and the weight accorded each. There is consequently no potential financial advantage to induce an attorney to play the waiting game.

In short, neither the language of the Rules nor considerations of policy justify the immunization of appraisers' opinions from discovery as of right; indeed, there are strong reasons for allowing such discovery. The trial of a condemnation case is long and arduous when each attorney tries to embarrass the other party's appraiser and convince the jury that the opposing appraisal is unsound. Numerous detailed questions may be asked concerning the factors considered by each appraiser in evaluating the condemned property.[16] Often the trials succeed only in confusing the jury, and verdicts unrelated to a sound rationalization of the most cogent evidence presented are not uncommon.[17] Pretrial discovery of the opinions of prospective appraiser-witnesses could do much to ameliorate this situation by facilitating shorter and more effective cross-examination.[18] A litigant could probe before trial the factors considered by an appraiser in making his evaluation and would be spared the necessity of the wide-range cross-examination now characteristic of condemnation cases. In particular, each appraiser's opinion of what is the highest and best use of the land could be discovered and each litigant could prepare fully to meet this issue, limiting his attack to the weakest elements of his opponent's appraisal.[19]

In holding that a party must answer interrogatories inquiring into the opinion of his appraiser who will testify at trial, the court in the present case couched its opinion in terms of experts generally, indicating that the opinions of all prospective expert witnesses will hereafter be discoverable as of right under the Arizona Rules. In future situations the court should not ignore the possibility that a different result might be appropriate when experts other than appraisers are involved.

---

[16] See Yates, *Testimony of the Expert Appraiser in Condemnation Proceedings*, 32 WASH. L. REV. 314, 317 (1957).

[17] *Ibid.* See generally Paul, *Condemnation Procedure Under Rule 71A*, 43 IOWA L. REV. 231, 236 (1958), in which it is suggested that trial of valuation issues before a jury is cumbersome and ineffective and that a special jury of selected persons would save time and yield more accurate results.

[18] See United States v. 19.897 Acres of Land, 27 F.R.D. 420, 422 (E.D.N.Y. 1961); United States v. Certain Parcels of Land, 15 F.R.D. 224, 233 (S.D. Cal. 1953); Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 485-86 (1962); Comment, 1959 U. ILL. L.F. 860, 863. It has been suggested that the threat of discovery of the contents of experts' reports would lead to the preparation of more honest and reliable reports. Friedenthal, *supra* at 485-86; Comment, *supra* at 863. Rather than stimulating objectivity, discovery might only cause experts to take greater care in the preparation of exaggerated claims.

[19] See Frost, *The Ascertainment of Truth by Discovery*, 28 F.R.D. 89 (1960). See generally Hawkins, *What's Wrong About Surprise?*, 39 A.B.A.J. 1075 (1953), which develops the thesis that effective cross-examination is destroyed by extensive discovery.

LIBEL AND SLANDER—Defense Attorney's Reply in the Press to Prosecutor's Press Release Prejudicial to Client Held Not Privileged

Defendant-attorney represented a Negro charged with the rape of plaintiff, a white married woman. After learning that the prosecutor had released to a local newspaper the Negro's confession of intercourse with plaintiff, defendant told the paper his client's story—that plaintiff had consented. After the story was published plaintiff sued defendant for slander. At the close of the evidence the trial court directed a verdict for defendant, holding that he had a qualified privilege to publish the statement.[1] The Maryland Court of Appeals reversed and remanded, holding that he had neither an absolute nor a qualified privilege to publish the slanderous statement. *Kennedy v. Cannon*, 229 Md. 92, 182 A.2d 54 (1962).

In order to allow counsel complete freedom to examine witnesses and explore all arguments and defenses without fear of defamation actions, courts have afforded attorneys an absolute privilege to make defamatory statements in judicial proceedings even if made knowingly and maliciously.[2] Although this privilege is not strictly confined to statements made within the courtroom, it does not extend to statements made directly to the press.[3] In addition, whenever the public interest in unimpeded communications outweighs the policy of protection of reputation,[4] courts have recognized a qualified privilege to communicate information in which the parties making and receiving the statements have legitimate interests.[5]

The court in the present case recognized the attorney's duty to protect his client's interests[6] and apparently realized that the prosecutor's press release was highly prejudicial to those interests;[7] nevertheless, it held that

---

[1] See Brief for Appellant, app., pp. 45-46 (trial court opinion).

[2] Maulsby v. Reifsnider, 69 Md. 143, 14 Atl. 505 (1888); Matthis v. Kennedy, 243 Minn. 219, 224, 67 N.W.2d 413, 417 (1954). See 1 Harper & James, Torts § 5.22, at 427 (1956); Prosser, Torts § 95, at 608 (2d ed. 1955). See generally Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463 (1909).

[3] See Washer v. Bank of America Nat'l Trust & Sav. Ass'n, 21 Cal. 2d 822, 136 P.2d 297 (1943); Jacobs v. Herlands, 17 N.Y.S.2d 711 (Sup. Ct.), *aff'd mem.*, 259 App. Div. 823, 19 N.Y.S.2d 770 (1940).

[4] See Hoover v. Jordan, 27 Colo. App. 515, 517, 150 Pac. 333, 334 (1915); Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 557-58, 117 A.2d 889, 891 (1955); Sokolay v. Edlin, 65 N.J. Super. 112, 124, 167 A.2d 211, 217 (App. Div. 1961).

[5] See, *e.g.*, Deckelman v. Lake, 149 Md. 533, 131 Atl. 762 (1926); Bostetter v. Kirsch Co., 319 Mich. 547, 558, 30 N.W.2d 276, 280 (1948). See generally *Developments in the Law—Defamation*, 69 Harv. L. Rev. 875 (1956). Thus a person may be privileged to publish defamation to protect his own interests, see, *e.g.*, Ling v. Whittemore, 140 Colo. 247, 343 P.2d 1048 (1959); Cartwright v. Herald Publishing Co., 220 S.C. 492, 68 S.E.2d 415 (1951), or the interests of the persons to whom he communicates, see, *e.g.*, Emde v. Central Labor Council, 23 Cal. 2d 146, 161, 143 P.2d 20, 28 (1943); Fowler v. New York Herald Co., 184 App. Div. 608, 172 N.Y. Supp. 423 (1918).

[6] Instant case, 182 A.2d at 59. See also ABA, Canons of Professional Ethics, Canon 5.

[7] The trial court also recognized this problem of prejudice. See Brief for Appellant, app., p. 46. See generally Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. Pa. L. Rev. 1 (1961).

defendant's communication was not qualifiedly privileged because it was not made to proper parties.[8] The court reasoned that newspaper publication of defamatory matter in order to counteract possible jury prejudice[9] cannot be privileged because even if the unknown jurors are considered interested parties within the scope of the doctrine of common interest, such widespread publication clearly would be excessive.

Although the court properly applied the common interest doctrine, it failed to consider the question of the Negro's right to reply to the prosecutor's allegations in order to repair the damage done his reputation by the press release containing only one side of the story. When such information appears without any statement of defense, an accused may be branded as a criminal in the minds of many readers; even subsequent acquittal may not repair the damage since news of acquittal may not reach many of the original readers. In similar cases in which persons have been assailed in the press, courts have granted a qualified privilege to reply to the attack[10]—not only to deny the charges, but also to question the motives of the assailant.[11] In the present case the defendant was merely trying to correct the misleading impression produced by the publication of only the prosecutor's version of the crime; certainly the accused should be privileged in protecting his reputation by stating his defense.

---

[8] Instant case, 182 A.2d at 59.

[9] The court suggested that the attorney had other means to effect this end. Instant case, 182 A.2d at 59. The court said that he could have tried to stop publication of the story, but the newspaper would have had no reason to agree. Another suggested means of preventing jury prejudice—*voir dire* examination—is manifestly ineffective and tactically dangerous because even if the juror has read the story and formed an opinion of defendant's guilt or innocence, he need not be discharged for cause if he states that he can disregard the story in reaching his verdict, see People v. Duncan, 53 Cal. 2d 803, 816, 350 P.2d 103, 110 (1960), *petition for cert. dismissed sub nom.* Baldonado v. California, 366 U.S. 417 (1961); Donnelly & Goldfarb, *Contempt by Publication in the United States*, 24 MODERN L. REV. 239, 246 (1961), and to ask about the story may recall it to a juror who has forgotten it. See Note, *Fair Trial v. Freedom of the Press in Criminal Cases*, 35 TEMP. L.Q. 412, 431 (1962). Though the Maryland Constitution provides an absolute right to a change of venue in capital cases, MD. CONST. art. 4, § 8; MD. ANN. CODE art. 75, § 44 (1957), this alternative is also inadequate since publication of such an inflammatory crime may well have reached every part of the state. See Note, *Controlling Press and Radio Influence on Trials*, 63 HARV. L. REV. 840, 844-45 (1950). Another alternative is waiver of jury trial. In Maryland, a defendant may waive jury trial even in capital cases. See Grammer v. State, 203 Md. 200, 100 A.2d 257 (1953), *cert. denied*, 347 U.S. 938 (1954). However, a defendant may need the prosecution's and the court's consent to waive. See Donnelly, *The Defendant's Right To Waive Jury Trial in Criminal Cases*, 9 U. FLA. L. REV. 247, 251-59 (1956); Note, *Government Consent to Waiver of Jury Trial Under Rule 23(a) of the Federal Rules of Criminal Procedure*, 65 YALE L.J. 1032 (1956).

[10] See, *e.g.*, Shepherd v. Baer, 96 Md. 152, 53 Atl. 790 (1902); Cartwright v. Herald Publishing Co., 220 S.C. 492, 498-99, 68 S.E.2d 415, 417 (1951). See generally Wettach, *Recent Developments in Newspaper Libel*, 13 MINN. L. REV. 21, 31-34 (1928). This has long been law in England. See GATLEY, LIBEL AND SLANDER 255-59 (5th ed. 1960). Continental law is also in accord with this view. See Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423, 441-44 (1952); Rothenberg, *The Right of Reply to Libels in the Press*, 23 J. COMP. LEG. & INT'L L. (3d ser.) 38 (1941). See also Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948).

[11] Mencher v. Chesley, 193 Misc. 829, 85 N.Y.S.2d 431 (Sup. Ct. 1948); Collier v. Postum Cereal Co., 150 App. Div. 169, 178, 134 N.Y. Supp. 847, 853 (1912). See GREGORY & KALVEN, CASES ON TORTS 1010-11 (1959).

The present case may be distinguished from the usual right-to-reply case[12] because the prosecutor, not the plaintiff, initiated the publication of information concerning the crime.[13] Nevertheless, as complaining witness, the plaintiff can be said to have been indirectly responsible for the publication[14] since she should have expected that her accusation of rape to the prosecutor would not escape the attention of the press. A charge of criminality, especially of a violent sex crime, can result in a substantial impairment of the accused's reputation. Of course plaintiff has a right, perhaps a duty, and certainly a privilege to file the charges, but the fact that the initial charges were privileged does not preclude a privilege to reply to them.[15]

Since it is difficult, if not impossible, for an incarcerated accused to reply in the press, it is essential, if defendant's right to reply is to have substance, that his attorney be allowed to exercise the privilege for him. In other situations courts have effectuated the right to reply by allowing a widow to reply to an attack against her deceased husband and by granting the newspaper in which the privileged reply appears a qualified privilege to print it.[16] Furthermore, it would be undesirable to require defendants to communicate directly to the press because of the danger that unadvised defendants may further incriminate themselves. Thus the court in the present case should have allowed the attorney, as his client's agent and counsel, a qualified privilege to reply to the prosecutor's press release by stating his client's defense.

Denial of the privilege in a case like the present does little to protect plaintiff's reputation. Unless the admission of intercourse is suppressed, the defense of consent almost certainly will be raised at trial when counsel will be absolutely privileged to publish it[17] and newspapers will be privileged to print it as part of the court record.[18] The preservation of the right to a fair trial by encouraging impartial reporting of both defendant's and prosecutor's version of the crime is another ground for according defendant a privilege to reply. Consequently, the present decision, although properly rejecting the contention of privilege on two other grounds, failed to take account of significant policy considerations that suggest the propriety of affording an accused's attorney a privileged right to reply to charges in the press.

---

[12] See, *e.g.*, Preston v. Hobbs, 161 App. Div. 363, 146 N.Y. Supp. 419 (1914); Chaffin v. Lynch, 83 Va. 106, 1 S.E. 803 (1887).

[13] See Brief for Appellant, pp. 5-6.

[14] See, *e.g.*, McDonald v. Lieber, 184 La. 812, 167 So. 450 (1936); Conroy v. Fall River Herald News Publishing Co., 306 Mass. 488, 28 N.E.2d 729 (1940).

[15] Duncan v. Record Publishing Co., 131 S.C. 485, 127 S.E. 606 (1925) (initial publication made in legislative hall).

[16] Israel v. Portland News Publishing Co., 152 Ore. 225, 53 P.2d 529 (1936). See, *e.g.*, Cartwright v. Herald Publishing Co., 220 S.C. 492, 68 S.E.2d 415 (1951); GREGORY & KALVEN, *op. cit. supra* note 11, at 1013; 1 HARPER & JAMES, TORTS § 5.17, at 401 (1956).

[17] See note 2 *supra* and accompanying text.

[18] 1 HARPER & JAMES, *op. cit. supra* note 16 § 5.24, at 431. See Note, *Qualified Privilege as a Defense to Defamation*, 45 U. VA. L. REV. 772, 776 (1959).